

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>TAMMI WHEELER</b>	)	
Claimant	)	
VS.	)	
	)	
<b>SHAY PRODUCTIONS</b>	)	Docket No. 247,943
<b>PREFERRED SIDING &amp; IMPROVEMENTS</b>	)	
Respondent	)	
AND	)	
	)	
<b>UNINSURED</b>	)	
<b>AMERICAN FAMILY MUTUAL INSURANCE CO.</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Claimant appeals the October 28, 2002 Award of Administrative Law Judge Jon L. Frobish. Claimant was denied benefits from Preferred Siding & Improvements (Preferred Siding) and its insurance company American Family Mutual Insurance Company (American) after the Administrative Law Judge determined that claimant was an independent contractor rather than an employee of Preferred Siding. This matter was placed on the summary calendar at the request of the parties.

**APPEARANCES**

Claimant appeared by her attorney, Stephen J. Jones of Wichita, Kansas. Respondent Shay Productions (Shay), an uninsured, appeared not. Respondent Preferred Siding and its insurance carrier American appeared by their attorney, William L. Townsley, III, of Wichita, Kansas. The Kansas Workers Compensation Fund (Fund) appeared by its attorney, Christopher J. McCurdy of Overland Park, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

**ISSUES**

Did the Administrative Law Judge err in determining that claimant was an independent contractor with Preferred Siding for purposes of the Workers Compensation Act?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire file contained herein, the Board finds the Award of the Administrative Law Judge should be affirmed.

This matter has been before the Board on three prior occasions. Claimant appealed the December 3, 1999 preliminary hearing Order of Administrative Law Judge Jon L. Frobish after the Administrative Law Judge determined that claimant was an independent contractor of Preferred Siding. The Board, in its Order of February 24, 2000, affirmed that decision.

The matter was next before the Board on appeal from the April 6, 2000 preliminary hearing Order of Administrative Law Judge Frobish over a dispute regarding the application of K.S.A. 44-503a (Furse 1993) and the apportionment of the awarded compensation between Shay and Preferred Siding. The Administrative Law Judge determined that, under K.S.A. 44-503a (Furse 1993), Shay would only be responsible for its apportioned share of the total award. The Board, at that time, held that appeal to be non-jurisdictional from a preliminary hearing, and the appeal was dismissed.

The matter was next before the Board on appeal from the April 16, 2001 Award of Administrative Law Judge Frobish. In that decision, the Administrative Law Judge again determined that claimant was an independent contractor of Preferred Siding, but an employee of Shay. Claimant had earlier impleaded the Fund, but had dismissed the Fund when Shay began paying benefits. At the time of the regular hearing, Shay was actively involved in the litigation and providing benefits to claimant. However, at the time the matter came before the Board, Shay had ceased any involvement in the case, was no longer providing benefits and was financially unable to provide any benefits.

At that time, both claimant and respondent Preferred Siding requested the matter be remanded to the Administrative Law Judge for a hearing pursuant to K.S.A. 44-532a (Furse 1993) regarding how to proceed on claimant's post-award impleading of the Fund and the inclusion of the Fund in the litigation, if appropriate. The matter was remanded to the Administrative Law Judge, the Fund impleaded, and the Fund was ordered to pay Shay's portion of the overall award. The issue dealing with the Fund's liability and the percentage of the overall benefits due from the various parties is not before the Board having not been appealed by claimant from the October 28, 2002 decision. The only issue presented to the Board deals with the employment relationship between claimant and Preferred Siding.

Additionally, as no briefs were presented to the Board after the October 28, 2002 Award, the Board will utilize the prior briefs and submission letters of the parties in determining this issue.

Claimant, who has done telemarketing for approximately 15 years, was doing telemarketing for both Shay and Preferred Siding at the time of her injury. Shay was a telemarketing company, with offices in Wichita, Kansas. Claimant worked at those offices and was provided a telephone, desk, phone books, call sheets and the presentation to be given. The Administrative Law Judge found claimant to be an employee of Shay, and that matter is not before the Board.

However, the relationship between claimant and Preferred Siding is substantially different. Preferred Siding, which sells siding as well as other home improvements and additions, is located in Dodge City, Kansas. Claimant did telemarketing for Preferred Siding out of her home in Wichita, Kansas. Preferred Siding gave claimant training on some of its products and an outline of a presentation. Claimant generally worked for Preferred Siding for approximately 32 hours per week, but determined her own hours. Claimant was to set appointments for Preferred Siding sales personnel and was given a goal of a certain number of appointments which she might set in a specific time period. Claimant provided her own telephone, but Preferred Siding paid the bill. Claimant was paid \$400 per week by Preferred Siding plus commissions. Claimant worked out of her own home, Preferred Siding withdrew no taxes from claimant's pay and telemarketing was not Preferred Siding's primary business.

The Board acknowledges that the Workers Compensation Act is to be liberally construed to bring employers and employees within its provisions and protections.<sup>1</sup>

It is often difficult in many situations to determine whether a person is an employee or an independent contractor. Many elements are involved in determining which

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<sup>1</sup> K.S.A. 1999 Supp. 44-501(g).

relationship may actually exist. There is no absolute rule for determining whether an individual is an independent contractor or an employee.<sup>2</sup> The relationship of the parties depends upon all the facts in the case. What label they use in describing their relationship to each other is only one of those factors to be considered.

The primary test used by the courts in determining whether an employer/employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed as well as the result which is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control which renders one a servant rather than an independent contractor.<sup>3</sup>

In addition to the right to control and the right to discharge the worker, other recognized tests of the independent contractor relationship are:

- (1) The existence of a contract to perform a certain piece of work at a fixed price;
- (2) The independent nature of the worker's business or distinct calling;
- (3) The employment of assistants and the right to supervise their activities;
- (4) The worker's obligation to furnish tools, supplies and materials;
- (5) The worker's right to control the progress of the work;
- (6) The length of time that the worker is employed;
- (7) Whether the work is paid by time or by the job; and
- (8) Whether the work is part of the regular business of the employer.<sup>4</sup>

In this instance, Preferred Siding did not, in the view of the Board, have the type of control most commonly associated with an employment relationship. Claimant set her own

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<sup>2</sup> *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

<sup>3</sup> *Wallis*, at 102 and 103.

<sup>4</sup> *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

hours and determined the specifics of her presentation. While respondent set goals, claimant controlled to a large extent what she did to reach those goals. Claimant worked out of her own home, no taxes were withheld from claimant's pay by respondent and, finally, telemarketing was not respondent's primary business. In considering the factors involved, the Board finds that claimant's relationship to respondent was that of an independent contractor and the decision of the Administrative Law Judge finding same is affirmed.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated October 28, 2002, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Ray Kangro, Shay Productions, 4301 Main Street, Kansas City, MO 64111  
Stephen J. Jones, Attorney for Claimant  
Warren R. Southard, Attorney for Respondent Shay Productions  
William L. Townsley, III, Attorney for Respondent Preferred Siding  
Christopher J. McCurdy, Attorney for the Fund  
Jon L. Frobish, Administrative Law Judge  
Director, Division of Workers Compensation